February 2014

Victim's Rights and the Danger of Domestication of the Restorative Justice Paradigm

Christa Obold-Eshleman

Follow this and additional works at: http://scholarship.law.nd.edu/ndjlepp

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndjlepp/vol18/iss2/17

This Note is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
NOTES

VICTIMS' RIGHTS AND THE DANGER OF DOMESTICATION OF THE RESTORATIVE JUSTICE PARADIGM

CHRISTA OBOLE-ESLEMAN*

Victims' rights laws and restorative justice theory seem to intersect in their mutual concern for reforming our criminal justice system to include the people most affected by any given crime. A few victims' rights laws include the language of "restorative justice."¹ Some commentators have labeled restorative justice as an outgrowth of the victims' rights movement,² and others link the two concepts in proposed reforms of the justice system.³ But are victims' rights laws really compatible with restorative justice? The answer is complex and highly dependent on one's view of the essence of restorative justice. The analysis yields a cautionary result for those interested in the restorative justice model, and suggests that a shift in the underlying theory of rights is necessary to arrive at a restorative conception of victims' rights.

This Note first examines the basic ideas and philosophies of restorative justice, followed by some of the main concepts and provisions in victims' rights laws. It then analyzes victims' rights concepts in the context of a restorative justice paradigm. Finally, this Note suggests points at which proponents of restorative justice should embrace victims' rights, and areas in which restora-

* J.D. Candidate 2004, Notre Dame Law School; Thomas J. White Scholar 2002–2004; B.A. 1997, Eastern Mennonite University. Special thanks to Donald Schmid for his assistance in the formation of this Note, to Tammy Krause and Paolo Carozza for their help, and to my husband, Stephen, for his support during the writing process.


tive justice advocates should be more cautious about collaboration in the institutionalization of victims’ rights.

I. RESTORATIVE JUSTICE

A. Defining Restorative Justice

While no single definition of restorative justice is agreed upon by all its adherents, some basic tenets can be extracted from the various writers on the subject. Howard Zehr was among the first to coherently articulate a philosophy of restorative justice. He explained the restorative justice perspective in the following way: “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” These three basic ideas have also been identified by others as the fundamental principles in any restorative justice theory.

The principles of restorative justice are readily distinguished from those of the current criminal justice system in the United States. First, whereas restorative justice focuses on crime as harm to specific victims, our current justice system defines crime as breaking the law, thus causing harm to the state as the representative of society in general. Accordingly, rather than the specific victims, the state is the primary party in dealing with the offense in our current system. Second, restorative justice promotes accountability by the offender to the victims to make amends. Our current system deals with guilt, punishment, deterrence, incapacitation, and/or rehabilitation of the offender by the state, but not primarily with repairing the harm to the victims. Third, restorative justice urges a process that involves the

6. Id. at 181.
7. See, e.g., Van Ness & Strong, supra note 4, at 49 (adding the goal of “reducing the likelihood of future harm”).
8. See Van Ness & Strong, supra note 4, at 49; Zehr, supra note 5, at 184–85.
9. Granted, many jurisdictions allow orders of restitution as part of the sentence for offenders; some jurisdictions even require it in certain cases. See, e.g., Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A (2000). Even the MVRA, however, implies that this is just another sort of penalty for the offender. See § 3663A(a)(1) (requiring restitution “in addition to or in lieu of, any other penalty”). Interpretation of the MVRA is split among the circuits as to whether the required restitution is punishment or equitable relief for victims. See U.S. v. Schulte, 264 F.3d 656 (6th Cir. 2001) (finding that the restitu-
VICTIMS' RIGHTS

victim, offender, and their communities in finding a consensual solution to the problems created by the offense. Meanwhile, our criminal justice process employs an adversarial model in dealing with the harm, pitting the offender against the state, and the abstract interests of the offender's liberty against the state's interests in societal security. Zehr argued that restorative justice involves nothing less than a paradigm shift—a change in presumptions—in how we view justice.

B. Philosophies Underlying Restorative Justice

The contrasts between traditional criminal justice and restorative justice beg the question of what philosophies underlie our current criminal justice system, as compared to those underlying restorative justice. At present, two main ideologies underpin the justification of our criminal justice system. These ideologies are, of course, the utilitarian and retributive theories. There has been much debate over, or alternatively ignoring of, the fact that these two accepted principles of our current criminal justice system are often incompatible. If one operates on a retributive or desert theory, a certain crime theoretically deserves a certain amount of punishment based on an ordinal ranking of the seriousness of offenses in terms of blameworthiness of the offender. On the other hand, the utilitarian theories of deterrence, incapacitation, and rehabilitation respond to an offender based on ideas of what will be the best outcome for the most people. Utilitarian ends may include the security of society or perception thereof, the prevention of crime, and the change of the criminal into a law-abiding citizen. Many have tried to reconcile the two competing modes of thought, coming up with com-

---

10. While the offender's interest in liberty as far as not being imprisoned is quite concrete and proximate, the liberty interests that are asserted in procedural maneuvers, for example to exclude certain evidence in the trial, are far more attenuated and removed from the common person's understanding of justice.


13. *Id.*
plicated formulas\textsuperscript{14} or fuzzy, discretionary balancing acts.\textsuperscript{15} Others subscribe just to one theory or the other,\textsuperscript{16} but leave those who adhere to the opposite theory completely unsatisfied. Our legal system has pretended that both utilitarian and retributive theory can be harmonized,\textsuperscript{17} but the “harmony” is more like cacophony, failing to offer one coherent theory.

The paradigm of restorative justice offers a viable, potentially cohesive alternative to the clash of utilitarian and retributive theories.\textsuperscript{18} While aspects of both retributive and utilitarian philosophies are present in the restorative justice theory,\textsuperscript{19} restorative justice should not be seen as a hybrid of the two, but as something quite distinct from both of them.\textsuperscript{20} Restorative justice, like retributive justice, does emphasize the moral element of justice—that a wrong has been done and justice requires righting that wrong.\textsuperscript{21} Unlike retributive theory, however, restorative theory does not focus on the desert of punishment of the offenders as a means of restoring some metaphysical scales of justice, but rather focuses on justice as the creation of a concrete obligation on the offenders to do what they can to remedy the situation.\textsuperscript{22} Like the utilitarian side of our current justice system that aims to create the best result for the most people, the results of restorative justice have been analyzed as to their statistical efficacy in deterrence and rehabilitation,\textsuperscript{23} and as to participant satisfac-

\begin{itemize}
\item \textsuperscript{15} Robinson, \textit{supra} note 12, at 1441–42 (speaking of the Model Penal Code and other writers’ attempts to balance or combine utilitarianism and retributivism).
\item \textsuperscript{16} Examples would be theorists such as Jeremy Bentham and Kent Greenawalt for utilitarian theory and Immanuel Kant, Jeffrie Murphy, and C.S. Lewis for retributive theory.
\item \textsuperscript{17} See, e.g., \textit{MODEL PENAL CODE} § 1.02 (1985) (listing among its principles of construction goals that are alternately consistent with either retributive or utilitarian theories); U.S. \textit{SENTENCING GUIDELINES MANUAL} § 1A(3) (2001) (stating a choice between theories was unnecessary “because in most sentencing decisions the application of either philosophy will produce the same or similar results”).
\item \textsuperscript{18} The theory is only “potentially” cohesive because restorative justice is still so young as a theory that much work still needs to be done to make necessary refinements to articulate a coherent philosophy.
\item \textsuperscript{19} See, e.g., \textit{VAN NESS & STRONG}, \textit{supra} note 4, at 44.
\item \textsuperscript{20} The view that restorative justice should be understood as a new theory apart from retributivism or utilitarianism would not be shared by all theorists.
\item \textsuperscript{21} See, e.g., \textit{VAN NESS & STRONG}, \textit{supra} note 4, at 44.
\item \textsuperscript{22} See, e.g., \textit{ZEHRA}, \textit{supra} note 5, at 186.
\end{itemize}
tion. However, at least for many restorative theorists, the value of restorative justice comes not just from its success in making society safer, but rather (similar in this way to retributive theory) the value of the theory comes from its morality as a vision for societal order, with its emphasis on appropriate relationships between people, and how to create those appropriate relationships. The distinction between traditional theories and restorative justice has been lost on many, indicating a need for more clarity in restorative justice language and a better articulation of a comprehensive underlying theory.

1. Worldviews Underlying Conventional Justice and Restorative Justice

The underlying set of assumptions through which one views reality, a worldview or paradigm, affects the conclusions one reaches about justice because it shapes the way questions are asked and the types of solutions that seem to make sense. At a basic level, three ways of viewing humanity exist. The first may be called atomic or individualist, in which a human is autonomous in knowledge and the world is comprised of such individual units. An individualist worldview would be primarily interested in autonomy and self-actualization, with social institut-


25. Like retributive theory, any theory based on morality is inherently religious or normative in nature, whether or not it is couched in those terms. Thus, it is not surprising that a number of restorative justice theoreticians have rationalized the theory through Christian doctrine. See infra notes 41-55 and accompanying text.


27. See, e.g., Zehr, supra note 5, at 87-94 (citing the pre-seventeenth century worldview that the earth was the center of the universe, which shaped the (now believed faulty) questions and conclusions of science for centuries).


29. Id.
tions as mediating influences between individuals.\textsuperscript{30} An organic or oceanic worldview is at the other end of the spectrum, in which the good of the community is of paramount importance (over the individual good), and conflict is suppressed for the sake of harmony.\textsuperscript{31} The final paradigm is the relational worldview, in which relationships are the basic building blocks of society, and "the Self exists only in dynamic relation with the Other."\textsuperscript{32} The human ideal in the relational worldview has been termed by one commentator to be "compassionate strength," a concept meant to express an integrated concern for both self and community in the pursuit of transformative growth.\textsuperscript{33}

Our current criminal justice system operates on the assumption that an adversarial system that pits alleged offenders against the state, and that objectively weighs the offense to determine punishment, will bring us to a desired state of equilibrium, which is justice. This view seems to fall largely into the individualist paradigm, in the sense that people are expected to act, and are judged, as autonomous beings. Government is necessary to maintain order among individuals and to ensure that the individuals all have the freedom and equality necessary to their individual pursuits of happiness.\textsuperscript{34} At the same time, however, we seem to have threads of the organic worldview in our utilitarian theories which are concerned not with the autonomous individual, but with the greatest good for the greatest number of people.\textsuperscript{35} This is one way in which the traditional United States criminal justice system attempts to operate under two conflicting theories, as was argued earlier in this Note.\textsuperscript{36} Our adversary system may sound like common sense to those who are accustomed to it, but

\textsuperscript{31} See Burnside, supra note 28, at 50; Bush & Folger, supra note 30, at 239-41.
\textsuperscript{32} Burnside, supra note 28, at 51 (quoting John Macmurray, Persons in Relation 17 (Humanities Press 1979) (1961)).
\textsuperscript{33} Bush & Folger, supra note 30, at 242.
\textsuperscript{34} Id. at 238-39.
\textsuperscript{35} The organic worldview is generally associated with non-Western societies that place a priority on closely-knit community. Where this thread has appeared in Western culture, some have argued that it serves not a healthy purpose, but merely "suppress[es] conflict for the sake of continued oppression of certain groups." Bush & Folger, supra note 30, at 239-40 (citing Laura Nader, Harmony Ideology: Justice and Control in a Zapotec Mountain Village (1990)).
\textsuperscript{36} See infra notes 12-17 and accompanying text.
it is just one paradigm. It should be relinquished if another paradigm actually is more reasonable.\textsuperscript{37}

The worldview underlying restorative justice could be viewed as falling into any one of the three fundamental worldviews—individualistic, organic, or relational. One could see restorative justice as simply a tool to better give individuals their fair chance at self-determination, by requiring an offender to restore the victim to her original position (an individualist view). Alternately, one could view restorative justice as an objectively better method of social control than other methods, ultimately lowering the conflict level of society (an organic view). These conceptions of restorative justice are arguably what is being adopted into our criminal justice system through victims' rights statutes, as discussed below.\textsuperscript{38} If the concept of restorative justice is integrated into the criminal justice system under these philosophies, however, it will not live up to its potential of being something quite different from what we now have.

Rather, the restorative justice paradigm should be described in terms of a relational worldview.\textsuperscript{39} This is the paradigm that makes the most sense in terms of the foundational assertions of the theory, which bear repeating at this point: “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”\textsuperscript{40} These three basic premises all point to the view of the person as existing in the context of relationships. The restorative paradigm of justice may be very different from the traditional paradigm of justice in more ways than simple use of different methods to arrive at justice. With a rela-

\textsuperscript{37} Whether it is even possible to speak of one basic theory as more “reasonable” than another is a profound question. Since all philosophies eventually come down to a set of preliminary assumptions (such as the nature of how we can know things to be true), it may be actually impossible to debate whether one philosophy has more merit than another, except in the context of a common worldview/tradition. \textit{See Alasdair MacIntyre, Whose Justice? Which Rationality?} 1-11 (1988). MacIntyre goes on to argue, however, that pluralistic views cannot all ultimately have equal claims to truth, and that finally, “traditions defeat and are defeated by other traditions depending on how well they are able to overcome ‘epistemological crises.’” \textit{Id.} at 362; \textit{see also} Jonathan Burnside, \textit{Tension and Tradition in the Pursuit of Justice}, in \textit{Relational Justice: Repairing the Breach} 42, 50 (Jonathan Burnside & Nicola Baker eds., 1994) (citing the same passage). For further discussion of how entire paradigm changes occur through crises in our understanding of how we know what we know, \textit{see Zehr, supra} note 5, at 89–94.

\textsuperscript{38} \textit{See infra} Section II.

\textsuperscript{39} \textit{See Bush & Folger, supra} note 30 at 229–59.

\textsuperscript{40} \textit{Zehr, supra} note 5, at 181.
tional paradigm as its foundation, restorative justice will ask different questions to determine what justice entails as a theory; only then can concrete methods be determined.

2. Religious Perspectives on Restorative Justice

Some restorative justice theorists, Zehr among them, arrived at a restorative theory through Christian biblical analysis. Without attempting a comprehensive biblical exegesis here, this section highlights some of the main points made by some theoreticians. The Old Testament concept of “shalom” (often translated as “peace”) is central. It “refers to a condition of ‘all rightness,’ of things being as they should be, in various dimensions.” Part of this condition is being in correct relationships with God and other people. The social form of such “correct relationships” was covenant with God and other people. The conception of justice arose from the covenant relationship of God with the people, and therefore the meaning of justice is “to make things right” in terms of relationships. In the case of a crime, making things right involved a punishment aimed at restoration of the offender to the community, or a settlement process between the aggrieved parties. This interpretation belies a common view that the Old Testament supports retaliatory justice.

The biblical New Testament seems even more radical in its many parables and teachings that urge “aggressive goodwill toward one’s abusers.” Christopher Marshall argues that the

---

41. See, e.g., CHARLES W. COLSON, JUSTICE THAT RESTORES (2001); CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT (2001); DANIEL W. VAN NESS, CRIME AND ITS VICTIMS (1986); ZEHR, supra note 5.

42. ZEHR, supra note 5, at 130 (relying on PERRY B. YODER, SHALOM: THE BIBLE’S WORD FOR SALVATION, JUSTICE, AND PEACE (1987)); see also VAN NESS, supra note 41, at 120 (stating that shalom “includes notions of harmony, contentment, and reconciliation. It is the ideal state in which the community is to function”).

43. ZEHR, supra note 5, at 131.

44. Id. at 133.

45. Id. at 137. See also VAN NESS, supra note 41, at 121 (“The full meaning of justice is to establish once again the shalom that existed before the offense. Justice is active and relational and it is redemptive in its intent.”).

46. ZEHR, supra note 5, at 139. This concept of justice encompasses more than criminal justice. It also deals with oppression, and emphasizes liberation. Id.

47. Id. at 141–42. Punishment could also be aimed at breaking the bonds of oppression by removing the power of the oppressor. Id. at 142.

48. CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT 90 (2001). Examples of such teachings include the following: “Do not judge, or you too will be judged,”
New Testament writers portray through the life of Jesus "an understanding of God's justice as a redemptive power that breaks into situations of oppression or need in order to put right what is wrong and restore relationships to their proper condition."

This biblical restorative framework has led such theorists and some church bodies to look for a modern-day framework that similarly does justice in a restorative manner.

Other spiritual bases for restorative justice have been noted as well. Restorative justice models have been inspired by the traditional conflict resolution practices of Aboriginal groups in Australia and New Zealand, and Native American groups in the United States. Theorists have observed that spirituality has been intrinsic to the indigenous models. Navajos have a word that roughly translates to "living in right relationship." When this ideal state of affairs is violated, a peacemaking circle may be initiated. Supernatural assistance is presumed to be a part of the process. Aboriginal Australians, New Zealand Maoris, and Native Americans tend to place value on the attendance by an elder with spiritual gifts at a restorative conference. Even theorists who base their restorative justice theories more on non-religious moral values or utilitarian views of "what works best" have said that a certain sense of spirituality in the process can help.

Matthew 7:1 (New International Version); the incident of the woman caught in adultery, the societal punishment for which was stoning, when Jesus said "'If any one of you is without sin, let him be the first to throw a stone at her;','" John 8:7 (New International Version); "'Love your enemies,'" Matthew 5:44 (New International Version).

49. MARSHALL, supra note 48, at 93; see also GERALD AUSTIN McHUGH, CHRISTIAN FAITH AND CRIMINAL JUSTICE: Toward a Christian Response to Crime and Punishment 145-65 (1978) (arguing that the biblical pillars of love and forgiveness require for Christians a view of justice as transformation toward those ideals).


52. Id.

53. Id.


55. See, e.g., id. at 25; Kay Pranis, Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations, in RESTORATIVE COMMUNITY JUSTICE 287, 301–302 (Gordon Bazemore & Mara Schiff eds., 2001) (citing the spirituality of
3. Feasibility of a Relational Paradigm for the United States Justice System

Some might say a relational value system is fine for tribal societies, but is contrary to our nation's ideal of rugged individualism. Individualism, though, has its limits, and is arguably not particularly helpful in today's modern society. The concept of American individualism gained prominence in the nineteenth century, when much of American law was being first formulated. Laissez-faire and capitalistic individualism emphasized freedom and autonomy, and the behavioral sciences centered on social Darwinism; any aberrant behavior was an individual defect.\textsuperscript{56}

Unlike law, though, modern social science has largely left the individualistic concept behind, in favor of a contextual model where people's social contexts play a very large role in determining their behavior.\textsuperscript{57} In addition, most of our business is done not as the lone cowboy out on the range or the solitary brilliant capitalist, but is in bureaucracies and teams, where different people are dependent on each other's work.\textsuperscript{58} The criminal law needs to recognize the importance of social context and community as well. While the importance of family and civic associations has been touted by politicians in other areas of public policy,\textsuperscript{59} their potential role in crime and conflict occurrence, prevention, and resolution has been downplayed in favor of holding the individual accountable only to the state through punishment. Even if it could be said that American society does not have a strong sense of community, restorative justice that involves community members should actually promote more cohesive communities in our society. Increasing the participa-

\begin{itemize}
\item \textsuperscript{56} Craig Haney, \textit{Making Law Modern: Toward a Contextual Model of Justice}, 8 \textit{PSYCHOL. PUB. POL'Y & L.} 3, 5-6 (2002).
\item \textsuperscript{57} \textit{Id.} at 7.
\item \textsuperscript{58} \textit{Id.} at 49.
\item \textsuperscript{59} The debates over school vouchers and faith-based community initiatives provide ample examples of exhortation of the value of devolving power from the government to smaller groups of people.
\end{itemize}
tion of immediate communities in criminal justice processes promotes a sense of ownership and responsibility for the welfare of its members. Arguably, restorative justice may have the most community-building impact in the areas that now are the most disenfranchised with the least amount of social support. Therefore, while some say community is a means of restorative justice, some also find it to be an end, an end both relevant and important to American society.

C. Restorative Methodology

The methods of restorative justice are many. Multiple theoreticians have posited two basic conceptions of restorative justice. One is focused on the process—bringing together all those affected by the crime to discuss what has happened and to agree on what is to be done. The second conception, “values theory,” is that restorative justice is anything dealing with restorative values or actions. The process theory heavily emphasizes some form of face-to-face meeting between the relevant parties. This might be in the form of mediation between the main victim and offender, a conference between victim, offender, and representatives of their communities, or conferencing with victim,

60. Pranis, supra note 55, at 293.
64. See Braithwaite & Strang, supra note 63, at 1 (citing values of “healing (restoration) rather than hurting”); Walgrave, supra note 62, at 260 (defining restorative justice as “every action that is primarily oriented towards doing justice by restoring the harm that has been caused by a crime” (quoting Gordon Bazemore & Lode Walgrave, In Search of Fundamentals and an Outline for Systemic Reform, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 45, 48 (Gordon Bazemore & Lode Walgrave eds., 1999)).
65. See, e.g., ZEHR, supra note 5 at 158–74 (describing the Victim Offender Reconciliation Programs).
offender, and their families.\textsuperscript{67} The outcome of the meeting would be assumed to be appropriate if an appropriate process has been followed,\textsuperscript{68} though the fairness of the outcome would be highly subjective to the parties and could vary radically from case to case. This subjectivity seems to describe what Frederick Schauer calls a “consensus theory of truth,” which involves “defining truth in terms of the process of the discussion.”\textsuperscript{69} Whatever is agreed upon is considered to be correct or true.\textsuperscript{70} With this theory, determining the appropriate process is essential.

A “values” theory of restorative justice encompasses a far wider variety of processes, since its focus is on whatever leads to the values of “healing (restoration) rather than hurting.”\textsuperscript{71} Such a theory could include coercive judicial system methods that arrive at restitution, community service, apology, or some other consequence,\textsuperscript{72} as long as they were aimed at repairing the concrete harms that had occurred.\textsuperscript{73} This focus on the harm is what would distinguish the restorative justice framework from the retributive or rehabilitative purposes that restitution or community service play in our current justice system.\textsuperscript{74} Restitution, in restorative justice, is aimed at restoring whatever losses the victims have experienced. Community service can be seen as restoring losses that the broader society has experienced as a result of

\textsuperscript{67} Family group conferences are often employed when the offender is a child. See, e.g., Allison Morris & Gabrielle Maxwell, The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential, and Pitfalls of Restorative Justice, in Integrating a Victim Perspective Within Criminal Justice: International Debates 207 (Adam Crawford & Jo Goodey eds., 2000).

\textsuperscript{68} See Braithwaite & Strang, supra note 63, at 1–2 (noting that someone espousing the process theory might say that a single-victim, single-offender mediation is not restorative because it does not involve other relevant persons in the community, while the same theorist could think that an outcome of canning the offender would be fine if the proper process is observed).

\textsuperscript{69} Frederick Schauer, Free Speech: A Philosophical Enquiry 19–20 (1982).

\textsuperscript{70} Id. (arguing that the consensus theory of truth most aptly fits the free speech model of the “marketplace of ideas” in which the value of an idea (goods) is solely determined by what is assigned to it by the people who compose the market).

\textsuperscript{71} Braithwaite & Strang, supra note 63, at 1.

\textsuperscript{72} Walgrave, supra note 62, at 273–74 (stating that “coercive restorative sanctions” do not fully achieve the potential of restorative justice, but are better than the alternative retributive and rehabilitative sanctions because of (a) the focus on the victim and the harm, (b) better reintegration of the offender into the community, and (c) having the coercive option creates more of a coherent, universally-applicable restorative theory).

\textsuperscript{73} Id. at 260.

\textsuperscript{74} See id. at 260; see also infra note 9 and accompanying text.
crime. For the "values" theoretician, a restorative process is optional.

While some would argue that the latter concept is most important, others offer a more convincing argument that a combination of both conceptions of restorative justice is the most helpful, and possibly essential to truly restorative justice. Some of the significance of a choice between process theory and values theory becomes clearer when applied to the practical question of how victims' rights relate to restorative justice.

II. Victims' Rights

Victims have largely been left out of the prosecution and resolution of crimes in common law jurisdictions since the kings in Britain consolidated their power around the twelfth century. The kings declared crimes a "breach of the king's peace" in which the king was the victim, and assumed jurisdiction over the incidents. The lack of a central role for the actual victims had not always been the case, as private prosecution and retribution or informal solutions were the norm for most of world history before that time.

During the 1960's or 1970's, a victims' rights movement began forming in the United States. A number of reasons for the emergence of the movement have been identified. The beginnings of victimology theory, a response to civil rights activity, and a backlash to Supreme Court decisions in the 1960's (such as *Miranda v. Arizona*) that afforded constitutional pro-

---

75. *Id.* at 269 (noting that societal losses might include loss of security or sense of order). Walgrave admits the difference may not be readily apparent to the average observer between the restorative use of community service and the retributive use (punishment through an "unpleasant, and even degrading, task") or rehabilitative use (teaching the offender about being a good citizen). *Id.* at 270-71. He argues, however, that an explicit distinction between the underlying values of restoration, retribution, and rehabilitation is essential, and will shape how the service is ordered and how it is understood by all parties. See *id.* at 271.

76. See, e.g., *id.* at 260.

77. See, e.g., Braithwaite & Strang, supra note 63, at 2.

78. *Van Ness & Strong, supra* note 4, at 1.


80. *Id.* at 21.

81. *Id.* at 26.


tions to criminal suspects have all been identified as foundations of the movement.

The victims' rights movement gained national attention and federal support in 1982 when Ronald Reagan established the President's Task Force on Victims of Crime. The report issued by the Task Force detailed recommendations for government action at all levels as well as recommendation for sectors of civil society, both of which were aimed at a more victim-friendly criminal justice system.

Some of the recommendations for governmental action included passing laws aimed at lessening the fear and traumatization of victims. These recommendations included confidentiality of address information and of counseling records, and changing evidentiary requirements to admit hearsay so victims would not be required to appear in person to testify.

Other recommendations were to increase security for the victim and society as against the alleged offender. Here the Task Force recommended making bail laws stricter, making conviction of the alleged offender easier by abolishing the exclusionary rule, abolishing parole, and limiting sentencing discretion or at least allowing the public to attend parole hearings, and creating liability for parole officials for negligent release of someone who later re-offends.

A few of the recommendations involved allowing the victims to have their monetary needs met, and others were designed to provide the victim with social services.

Finally, the Task Force made several suggestions to allow the victim an increased role in the prosecution of the alleged offender, such as keeping the victim informed as to the status of

86. See id. at 19–20.
87. See id. at 20–21.
88. See id. at 21–22.
89. See id. at 22–23.
90. See id. at 24–28.
91. Id. at 29–31.
92. Id. at 29.
93. Id. at 54–55.
94. See id. at 34 (restitution); id. at 37–47 (government-funded compensation).
95. See id. at 35–36 (government employee assistance programs); id. at 47–49 (victim resource agencies).
the prosecution, making victim impact statements mandatory at sentencing, requiring prosecutors to present victims' views on various matters to the court, and allowing victims to attend hearings, even if they are witnesses.

The states have adopted the recommendations in varying degrees through statutes and constitutional amendments. In addition, victims' rights amendments to the U.S. Constitution have been proposed a number of times, but have not yet been passed.

While the victims' rights movement has spread to all of the states and the federal government, there is a lack of consensus on the philosophy underlying the movement. The President's Task Force stated that as a response to the unheeded pleas of victims for justice and for help, the Task Force was to bring the criminal justice system back to "the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it." Another interpretation is that people "became tired of seeing convicted criminals receive sentences lighter than what they believed served the ideals of punishment and deterrence."

Professor Robert Mosteller divides victims' rights advocates into three groups based on their underlying philosophies. The first group includes the advocates who have the goal of gaining participatory rights for victims in the criminal justice process. The second group has a pro-prosecution slant, aimed at more and harsher convictions through favorably balancing victims' rights against offenders. The final group Mosteller describes is composed of those who want greater victim aid and protection from the government. While the goal of using vic-

96. Id. at 60–61 (police); id. at 64 (prosecutors).
97. Id. at 33, 76–78.
98. Id. at 65–66.
99. Id. at 80.
100. See Tobolowsky, supra note 79.
103. Glenn, supra note 84 at 3.
105. Id. at 1054.
106. Id.
107. Id. Victims' rights in Europe have largely followed the aid model, with organizations having the objectives "primarily to alleviate suffering." Heather Strang, The Crime Victim Movement as a Force in Civil Society, in Restorative Justice and Civil Society supra note 63, at 69, 75.
tims' rights simply as a way to obtain more punishment for offenders cannot support restorative ideals, the participatory rights and victim aid visions seem facially compatible with the restorative justice framework as steps toward restoration of the harm. The question is whether such goals must be restorative in practice.

As victims' rights laws increasingly shape the criminal justice process, it is important for advocates of restorative justice, who are inherently interested in the roles victims play in criminal justice, to step back and evaluate the goals and philosophies the laws are serving. While some of the practices demanded by victims' rights laws, such as restitution, participation in the process, and forbearance from re-traumatizing the victim during the trial, are among the practices advocated as part of a restorative justice paradigm, one should be careful about assuming these practices are always "restorative." The context and relationship between practices and philosophies must be considered.

III. VICTIMS' RIGHTS ANALYZED IN A RESTORATIVE PARADIGM

Two possible models of victims' rights exist, according to law professor Kent Roach: punitive and non-punitive. The punitive model follows Herbert Packer's classic delineation of the crime control and due process models of criminal justice. Packer's crime control model "is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process." Packer's due process model is concerned with a formal process that will protect reliability of the truth of outcomes.

Roach's punitive model of victims' rights encompasses both of Packer's models. Like both of Packer's models, Roach's punitive model focuses on the past and on the state response to crime, and draws bright-line categories of victims and offenders. Like Packer's crime control model, Roach's punitive model "assumes that the enactment of a criminal law, prosecution, and punishment controls crime." The participation of the victim is seen as a way to legitimize the punishment. Like

110. Id. at 9.
111. Id. at 13–14.
113. Id. at 30.
114. Id. at 31.
Packer's due process model, Roach's punitive model uses victims' rights as a way to counter excessive due process rights for offenders. Roach's punitive model of victims' rights seems to largely depict the rationale given for current victims' rights laws.

The non-punitive model of victims' rights focuses on crime prevention, and, when crime does occur, tries to decrease the harm through restorative justice. Restorative justice presents an alternative to both the crime-control and the due process concepts of the punitive model of rights. Contrary to the crime-control model, which focuses on the state as the victim and seeks to punish for past wrongs, restorative justice looks at the individual people who have been harmed and how that harm can be repaired in the present or future. The due process model, on the other hand, views the state as a potential perpetrator of rights violations for the offender, and therefore "focuses on rights to the exclusion of duties," thus encouraging the offender to deny as much responsibility as possible. In contrast, restorative justice, while concerned with having a good process, eschews the legalism of due process, removes control of the process from legal professionals, and encourages offenders to take responsibility.

With such different values from the traditional crime-control and due process models of our current criminal justice system, the question of what place rights hold in restorative justice theory, compared to their obvious place in traditional criminal theory, is very important.

A number of restorative justice theorists feel that there is a place for rights (of both victims and offenders) in restorative justice theory, but that it is in the traditional criminal justice system, which should be the failsafe only when restorative processes cannot or do not work. Placing "rights" only in traditional crimi-

115. Id. (offering the example of limiting the exclusionary rule, as has been done through some states' victims' bills of rights).

116. See, e.g., Diane Feinstein & Jon Kyl, A Criminal Imbalance: Victims' Rights Amendment Will Righten Injustices, WASH. TIMES, Apr. 19, 2002, available at http://feinstein.senate.gov/Speeches02/vicoped.htm ("A constitutional amendment will help balance the scales of justice. Currently, while criminal defendants have almost two dozen separate constitutional rights—fifteen of them provided by amendments to the U.S. Constitution—crime victims have absolutely none.").

117. ROACH, supra note 108, at 34.

118. Id. at 35.

119. Id. at 35-36.

120. Id. at 36.

121. Id. at 35.

122. See, e.g., PRANIS, supra note 55, at 300 ("Coercive rights enforcement remains an important last-recourse strategy when appeals based on respectful, non-confrontational dialog have failed repeatedly.").
nal processes may be consistent with a "values" based restorative theory. But is restorative justice such a different paradigm that rights are incompatible with ideal restorative processes? And if so, how can we be certain that some participants will not be trodden upon? These are difficult questions for restorative theory.

A. The Inconsistencies of "Rights" with a Restorative System

One of the main problems in comparing or attempting to synthesize victims' rights with restorative justice is the concept of "rights" itself. The word "rights" has a number of connotations in its American usage that may be antithetical to a relational concept of restorative justice: first, objective individualism, removed from a subjective community context; second, a bright line between victim and offender; third, an adversarial view of conflict.

1. Individualism

From a restorative view, one of the shortcomings of our current criminal justice system is that it views the criminal act in isolation from the relationships that were harmed, including the relationships between victim and offender and between offender and broader community. In reality, the immediate communities of both the offender and the victim have a stake in the harm that has occurred, sometimes as co-victims. The "rights" models, though, as understood in this country, are largely centered around individual autonomy that is objectively measured. This presents a conflict in paradigms.

Leslie Sebba suggests that the decline of the rehabilitation model of criminal justice has something to do with the rise of individual rights language and theory. The rehabilitation model promotes a passive role for the object of rehabilitation, whether victim or offender, with a pseudo-medical diagnosis of problem and treatment. The language of rights is more active, implying a proactive role for victims or offenders in claiming

123. See Zehr, supra note 5.
124. See, e.g., Richard Young, Integrating a Multi-Victim Perspective into Criminal Justice Through Restorative Justice Conferences, in Integrating a Victim Perspective within Criminal Justice: International Debates, supra note 67, at 227, 233 (noting that families suffer in caring for the injured or because of lost wages of the injured party; witnesses may feel shock or guilt, or the community in the immediate area may feel a loss of security).
125. Leslie Sebba, The Individualization of the Victim: From Positivism to Postmodernism, in Integrating a Victim Perspective within Criminal Justice: International Debates, supra note 67, at 55, 64.
their own rights.126 This may be positive as far as logically leading to a more participatory system consistent with restorative goals.127

A danger in the current American system, however, is that the language of individual autonomy of victims is being stuffed into a mal-fitting framework of just deserts for offenders. Rights and individuality of victims are being inserted into the system in a way so as to use them to determine desert of offenders. Where once the individuality of the offender was the predominant consideration in determining desert for a particular crime (observing all the defendant’s process rights, scienter, and mitigating circumstances), now victims’ rights and individuality are to be considered through presentation of individual impact of the crime and desires for certain outcomes.128 The concept of desert may simply be shifting to consider the individuality of the victim in determining what punishment the offender deserves for the crime. This subjectivity does not comport either with the objective concept of deserts for the offender, nor with offenders’ rights.

The problem is that rights are seen as individual absolutes granted to autonomous persons. There is little sense of relationship or subjectivity in the American concept of rights, yet subjectivity is what rights such as victim allocution bring to our criminal justice system. While Sebba thinks that participatory rights that bring a subjective element can be absorbed in a communitarian way that could be either vengeance-oriented or restorative,129 there may be a more fundamental problem in the “rights” language itself, in that it is, by definition, focused on individual autonomy, and is thus anti-relational.

2. Bright Line Between Victim and Offender

A second potential conflict between the language of rights and restorative justice concepts is that the traditional victims’ rights model bestows “rights” based on drawing a bright line between victim and offender. The model stresses “the innocence of victims and the guilt of offenders,” and denies any overlap between the two categories.130 To allow that there may be some

126. Id.
128. See, e.g., Payne v. Tennessee, 501 U.S. 808, 823 (1991) (“Victim impact evidence . . . is designed to show instead each victim’s ‘uniqueness as an individual human being.’”).
129. Sebba, supra note 125, at 70.
responsibility on the victim for the incident is generally eschewed by victims' rights advocates and lawmakers. While such advocates are entirely correct that "blaming the victim" is completely inappropriate in many cases, there are other cases in which the victims played an active role in their "victimization." The stereotypical "ideal victim" portrayed by some victims' rights advocates is a person such as an elderly woman who is robbed and raped in her home or a child molested by her school bus driver. These are examples taken directly from the report by the President's Task Force. In fact, all of the many examples given by the Task Force are "ideal victims" in the sense that they reflect the stereotypical epitome of an innocent person who inexplicably suffers at the hands of another.

But victims are often not "ideal." The status of some people as "victim" rather than "offender" is not entirely clear. The following scenario, in which the parties dispute many of the details, provides an example. Several African-American teenage boys were biking through an alley, when a white man in a pickup drove through at a high rate of speed (according to the boys) almost hitting one of the boys. (The man said the boys were trying to block his way.) The man then stopped his vehicle ahead of the boys and yelled racial obscenities and told the boys to go home. The boys also yelled at the man and may have also used racial obscenities. Finally, one of the boys punched the man. The man called the police and the boys were arrested. In this sort of case, the justice system identifies the man as the victim. But the story makes clear that the line between victim and offender is not very clear, even if just one side of the story is accurate. Both parties had some role in the altercation.

Assigning a bright-line label of "victim" or "offender," and according rights based on that line, sometimes leads to an inaccurately dichotomous view of reality. Some victims' rights programs try to avoid the gray areas by ensuring that only "ideal" victims are eligible for services. England's Criminal Injuries

132. See David Miers, Taking the Law into their Own Hands: Victims as Offenders, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES, supra note 62, at 77, 79 (citing the term coined by Nils Christie, in Nils Christie, The Ideal Victim, in FROM CRIME POLICY TO VICTIM POLICY 17 (Ezzat A. Fattah ed., 1986)).
133. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, supra note 85, at 2–3.
134. See, e.g., Young, supra note 124, at 233 (stating that in many events, it is unclear who initiated the problem and the degree of responsibility between "victim" and "offender," giving the example of an altercation between intoxicated parties).
Compensation Authority, for example, awards compensation for harms to victims only if the victims are found to be without blame. The United States' version of national victim compensation awards grants to the states, and the states may decide what qualifications the victims must have in order to be eligible for compensation for harm. The states generally at least require that the victims cooperate with law enforcement in order to be eligible, but some states also require that the victim be innocent, or not have contributed to the crime. These various requirements signify that at least for this particular right of victims—the right to compensation for losses—government bodies have found different ways to draw the bright line between victim and offender. Some attempt to keep out non-ideal victims, while others presume that any cooperative people who have been ascribed the "victim" label in the criminal justice process merit compensation, no matter what their role in the matter.

The words "victim" and "rights" have become endowed with symbolic meanings that may distort reality. The association of the word "victim" with such qualifications as innocence and non-provocation, combined with "rights," which suggests independence over oppression, is a potent rhetorical strategy. "[T]he symbolic strength of the term 'victim's rights' overrides careful scrutiny: Who could be anti-victim?" Because of the distortive effect of this language, in many cases restorative justice should not promote these bright lines.

Whether the categories of victim and offender are helpful in restorative justice is disputed by restorative justice practitioners. Some say that all parties should come to the table without

135. Miers, supra note 132, at 90.
137. Id.
140. Id. at 952.
pre-attached labels, especially in the complex cases. Others would feel that this unjustly de-emphasizes the violence or other offending conduct that has been perpetrated by one party. Whether or not to label the parties may be especially relevant for those who emphasize the process aspect of restorative justice because a good process depends on the theory applied, and the symbolism of labels may be an important aspect of the theory.

Beyond labeling people as victims or offenders, adding "rights" to the categories further segregates the parties. In the case of the less-than-ideal victim, this segregation is not likely to lead to the sort of accountability compromise between the parties that is necessary to remedy all of the harm done.

3. "Rights" As a Promotion of the Adversarial Model

A third problem with the language of rights is that it promotes an adversarial model of justice. One of the roots of restorative justice is that the offenders accept accountability for what they have done. From this base, the process can move on to a consensus on how to repair the harm. Even for those who embrace a "values" model of restorative justice that would allow for a broader variety of processes as long as the outcome was aimed at restoration, there is an argument that an adversarial process is intrinsically contrary to a restorative resolution. Because the adversarial process is conceived as the way our justice system reaches truth and an appropriate resolution, vigorous argument by each side in favor of their own position is deemed essential to reach the right conclusion. Adversarial argument stands in opposition to the restorative model that expects the parties to reach beyond stubbornly arguing for the best possible outcome for themselves, and engage in truth-telling of their own accord in order to come to a consensus on future action for the good of all concerned. The restorative model is not entirely
self-centered and involves acceptance of duties to make the process work because the outcome is dependent on the mutual cooperation of the parties.\textsuperscript{147}

The language of the traditional due process rights model, in contrast, "focuses on rights to the exclusion of duties."\textsuperscript{148} The traditional adversarial system encourages offenders and their defense attorneys to use their "rights" to take the least amount of responsibility possible. There is no language of duty or accountability in traditional conceptions either of offenders' or victims' rights.\textsuperscript{149} Instead, there is a presumed clash of the rights of victims and offenders, with "justice" requiring a balance of those rights.\textsuperscript{150} This, indeed, is the precise reason some have proposed the need for victims' rights constitutional amendments as well as other victim-focused legislation—to gain a more advantageous position for victims (as compared to offenders) and to even out a perceived inequality in the playing field.\textsuperscript{151}

To the contrary, restorative justice processes find much of their power in the humanization of the "enemy" that takes place when the parties meet to discuss the offense. If the offender was not known before to the victim, now she is (and vice versa). Rights, however, "have their home in the arms-length, imper-
sonal sort of relationship in which the courts tend to view litigants—that is as members of the community of strangers."  

The concept of an adversarial, impersonal balancing of rights is contrary to the process-based model of restorative justice, which emphasizes the offender and victim coming together to find a solution. More study should be given, though, to the question of whether an adversarial process may be intrinsically contrary to a resolution consistent with restorative values.

IV. CURRENT VICTIMS' RIGHTS LAWS AND RESTORATIVE JUSTICE

Whether or not the language of rights is somehow intrinsically contrary to restorative justice, the current victims' rights laws and proposals are developing largely in a way that is problematic for the restorative justice vision. Many people believe victims' rights have been happily appropriated by law-and-order advocates as a way to be tougher on crime or rehabilitate the offender, to the detriment of remedying the harm.

The adversarial and punitive view of victims' rights held by the President's Task Force on Victims of Crime can be seen through the statement of one of its members, who drew a line between two types of policy: "The first of these is the hard-line or victim-oriented viewpoint; the second is the permissive or criminal-oriented approach." Andrew Ashworth notes that both sentence severity and victim involvement in the process simultaneously escalated recently, suggesting that victims are being used for traditional offender-focused punishments without the goal of remedying the harm.

Some of the recommendations of the President's Task Force allow more victim involvement in the process, which would seem to be a goal consistent with restorative justice; yet, as applied, the victim involvement gives no such aid to restorative goals. An example is one of the most commonly codified victims' rights

152. Golding, supra note 149, at 63.
provisions, the victim impact statement. The effect of allowing information about the harm to the victim into the consideration of sentencing has the effect of changing the focus in the court from individualization of the offender to individualization of the victim. The Supreme Court in *Payne v. Tennessee* decided that the focus on individual emotional impact and characteristics of the victim was allowable in sentencing. This shift is not particularly helpful in light of the restorative goal of de-emphasizing individualism in favor of a broader relational understanding of crime.

In addition, studies show that in the professional adversary system, lawyers and judges alike have tended to try to minimize victim control of the outcome. Such legal professionals limit the effect of victim impact statements either through comparison of the actual victim to the "reasonable victim," or by criticizing the victim's input for lack of objectivity. One study showed victim impact statements were more likely to be introduced in cases in which the prosecutor felt there was some advantage to the prosecution in introducing them. Otherwise, legal professionals were likely to discourage victims from submitting an impact statement, possibly by reminding the victims that it would

---

156. A victim impact statement is "a statement made to inform the [court] of any physical or psychological harm, or any loss or damage to property, suffered by the victim as a result of the crime." Erez, *supra* note 153, at 166.

157. *Id.* at 167.


159. *Id.* at 825 ("'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'") (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

160. Some argue that although the victim's perspective is promoted as an argument in favor of tougher laws against offenders, the retributive goals of the current criminal justice system are actually belied by the shift from focus on the offender's act to the victim's personalized injury. This individualization of the victim, through focus on harm because of distinct personal characteristics of the victim and others affected, arguably has the effect of undercutting proportionality based on the offender's act, a fundamental precept of retribution theory, in favor of disproportional retaliation based on harm to the victim. See, e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 999–1001 (1985). The Supreme Court's decision in *Payne* held that such victim individualization did not necessarily violate the constitutional ban on cruel and unusual punishments. *Payne*, 501 U.S. at 827.


162. *Id*.

mean they would be subject to adversarial examination. In the context of a professional adversarial system, the victim impact statement thus far has had little effect in changing the level of victim participation in the process, or in outcomes. This example of the current application of one common victims' rights provision should cause concern for both process-oriented and values-oriented restorative justice theorists.

V. FINDING A PLACE FOR "RIGHTS" IN RESTORATIVE JUSTICE

While this discussion demonstrates there are numerous reasons to be wary of presuming victims' rights can be restorative, an argument can also be made that "rights" are necessary in a restorative justice process in order for it to be just, and that the concept of rights can be reformulated to be more in line with a restorative justice paradigm.

A. The Need for Rights to Prevent the Masking of Abuse

As both critics and advocates of restorative justice will point out, a real danger exists that the inherent subjectivization of justice, at least in restorative processes, could lead to wildly disproportionate treatment of offenders, depending on the needs, harm to, and wishes of their victims. Others find victims' rights necessary to ensure that the morality of the victim's position is not subsumed by the neutrality of mediation. The latter would be especially important when the victim has ongoing fears of the offender, or other psychological impediments to fully asserting her position. Proportionality and power imbalance concerns should both be important checks on the theory of a restorative system, because we cannot realistically expect all parties to crimes to behave within restorative ideals, if left unbounded.

To create a truly restorative system, then, one must ensure that "restorative justice" does not become the newest benevolent mask for unjust abuses of power. Some theorists believe that a restorative system must have at least some basic rights assurances

164. Id. at 291.
165. Erez, supra note 153, at 173. Some restorative justice practitioners have not given up hope on the possibility of victim impact statements playing a restorative role and of converting criminal justice professionals to view victim participation in a more restorative manner. See infra notes 188–190 and accompanying text.
for the offender, in order to limit the power of the victim and the state to determine her future.\textsuperscript{168} The question, then, becomes how rights can be incorporated into restorative justice theory in a way that does not compromise the theory by bringing in individualism, an inappropriately bright line between victim and offender, and an adversarial, punitive framework.

B. Towards a Restorative Theory of Victims’ Rights

The most obvious place in a restorative framework for traditional victims’ rights is in our criminal justice system as it stands now, to be used as the last resort for assurance that no person is trodden upon when restorative processes (like victim-offender mediation or sentencing circles) fail for some reason.\textsuperscript{169} Some would argue that attempts at restorative processes should be abandoned, and formal legal rights and processes\textsuperscript{170} should be invoked with any crime above a certain level of seriousness.\textsuperscript{171} No matter how punitive or prosecution-oriented victims’ rights may be in our adversarial system, they are more socially useful than no such protections at all.

But relegating “rights” to a parallel but separate justice mechanism, unabashedly abandoning a restorative ideal and requiring the traditional criminal justice system as a fallback, is unsatisfying because it does not afford a comprehensive, universally applicable theory of restorative justice. For restorative justice to be a viable theory, “practitioners and researchers have to cope with the tension between human emotional and relational processes and the formal rules which hold essential guarantees against misuses of power.”\textsuperscript{172}

Thus, a place within the restorative justice paradigm for victims’ rights must exist, but we must consider whether it is the same form of “rights” currently present in our criminal justice system.

\begin{itemize}
\item \textsuperscript{168} See, e.g., id. at 194.
\item \textsuperscript{169} See, e.g., Kay Pranis, Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations, in RESTORATIVE COMMUNITY JUSTICE 287, 300 (Gordon Bazemore & Mara Schiff eds., 2001).
\item \textsuperscript{170} Such as those recommended by the President’s Task Force on Victims of Crime. See infra Section II.
\item \textsuperscript{171} See, e.g., Roach, supra note 108, at 305 (“To ensure political survival . . . such a line may be necessary at least until restorative justice has a proven record of success and the concerns of victim-advocacy and women’s groups can be addressed.”).
\item \textsuperscript{172} Walgrave, supra note 62, at 277 (“[Restorative justice practitioners and researchers] must not repress this tension but work within it, in order to prevent the restorative justice practices from deteriorating into being highly unjust.”).
\end{itemize}
1. Elements of a Restorative Conception of Rights

To be consistent with the rest of restorative theory, a restorative theory of rights would have to be non-adversarial and relational. Restorative rights must not be a zero-sum equation of power allocation that require careful balancing so that the relative power of victim and offender cancel each other out. Rather, a restorative view of rights must be based on mutual benefit.

When stripped down to their basic meaning in our current criminal justice system, rights are a way of allocating power so as to create a playing field that society views as fair. This meaning of rights describes a model of power that is adversarial, with players having “power against” each other.\(^{173}\) The meaning or purpose of rights in a restorative context should be mutual promotion of the dignity of all individuals involved, multiplying the power of each participant with that of the other participants to arrive at transformation of the situation into something better. This model can be described as integrative power, or “power with” one another.\(^{174}\) The essential nature of integrative power is cooperation “between equals or near equals.”\(^{175}\) Participants may have to be urged to cooperate to harmonize their goals, but this is not accomplished through coercion.\(^{176}\)

The concept of integrative power as a restorative model raises some potential problems. First, the participants should be at least near equals. Lack of equality may be a serious problem in the criminal context, when there are likely to be imbalances because of fear, or lack of material or mental resources. However, the idea of restorative justice is that justice is not a zero-sum situation, and the goal is transformation of less than ideal situations, including problems of power and dignity. Integrative power with another person involves not just a right, but an obligation that arises in response to the right asserted. Asserting the right is a form of power because it creates an obligation. Fulfilling the obligation is a form of power because the person asserting the right needs the performance from the other.\(^{177}\) Thus, “[t]he dignity and freedom of moral agents is promoted in part by the co-operative process of claiming entitlements and fulfilling obligations.”\(^{178}\)

\(^{173}\) See, e.g., Kieran Cronin, Rights and Christian Ethics 189–91 (1992) (describing the categories of power theorized by psychiatrist Rollo May in Rollo May, Power and Innocence (1976)).

\(^{174}\) Id. at 190–91.

\(^{175}\) Id. at 190.

\(^{176}\) Id.

\(^{177}\) Id. at 191.

\(^{178}\) Id. at 204.
This model of rights and obligations provides a more relational and non-adversarial concept of rights, one that is not centered on rights as against the government. With careful facilitation, initial problems of situational imbalances between parties may largely be resolved in a restorative process. In the cases of participants who are less willing or able to work in an integrative power framework, a more coercive application of rights may be required. For some process theorists, this may mean abandoning hope of true restorative justice and settling for a second-best of the traditional system. It is possible, however, to imagine a restorative process theory that begins at the least coercive level and becomes successively more legalistic.

The second problem with the integrative power concept is that it espouses non-coercion, yet in reality there will be a certain level of coercion in most restorative processes, because the looming alternative (and predecessor) will usually be the traditional criminal justice system. It is coercion of the offender by the police that lands her in the criminal justice system, and thus in a restorative justice process such as victim-offender mediation, and it is a much higher level of coercion that probably awaits her as a default if she does not successfully complete such a program. A lesser level of coercion to successfully complete the program exists for the victim if he wishes to play a leading role in the outcome of the process.

Is any level of coercion problematic for a restorative justice rights model to be based on integrative power? Not necessarily, because outside pressures can sometimes work towards positive internal goals. This is one of the reasons that restorative justice emphasizes the role of the community in justice.

---

179. See Daniel W. Van Ness, Restorative Justice and International Human Rights, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 17, 31 (Burt Galaway & Joe Hudson eds., 1996) (arguing that a restorative justice framework offers a coherent way to include the responsibilities, as well as rights, that the United Nations' Universal Declaration of Human Rights has alluded to).


182. See, e.g., Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation 282–83 (1994). Bush and Folger argue that mediation should not be about the "bottom line." If parties are unable to reach toward the "compassionate strength" ideal, and simply want to deal with a concrete resolution, the courts, with their rights-protective mechanisms are more appropriate. Mediation should be about proper, transformative process. Id.

183. See, e.g., Paul McCold, Restorative Justice and the Role of the Community, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 93 (Burt Galaway &
from family and community can positively encourage accountability. Care must be taken, however, to formulate rights in a way that takes account of outside pressures to reach a fair result.

The pure subjectivity (and potential disproportionality) of the result may be tempered when the focus is not simply on process, but also on restorative values in the outcome. If a "correct restoration" is required, that means balancing "the seriousness of the material, relational, and social harm caused by the offence and the degree of restorative effort imposed on the offender."\textsuperscript{184} If, however, a third party assigns objective weights as to the restorative effect of outcomes, thus potentially vetoing the outcomes reached through consensus of fairness by the participants, there is more need for objective rights to protect the participants from unlimited power of the state, community, mediator, or whoever is deciding the objective value of the outcome.\textsuperscript{185} Such an objective determination (by a third party) would require additional formal rights for the affected parties. A theory of restorative victims' rights would be essential if avoidance of disproportionality is considered part of restorative values.

To summarize, a restorative model of victims' rights would include a number of elements, and would depend on whether one is a "process" or "values" theoretician. Restorative victims' rights could not include an adversarial concept of rights that clash against each other to reach a balanced outcome. Rather, it must be relational—including both rights and obligations for all parties. What these rights and obligations might look like, practically speaking, depends in large part on how much trust we have in small groups of people to act properly on broad goals, and how much we believe a "fair" result means the same result across group lines. The more specific and numerous the rights and obligations become, the more coercive the process is likely to be.

2. Current Victims' Rights as Restorative Rights?

As noted before, some current victims' rights concepts seem facially compatible with restorative justice theory. Simply endorsing victims' rights that seem compatible with restorative goals, however, does not mean that the rights will be restorative in application. Lode Walgrave notes the danger in introducing res-

\textsuperscript{184} Walgrave, \textit{supra} note 62, at 276.

\textsuperscript{185} \textit{Id.}
toration-based victims' rights into the adversarial system. He argues that the restorative victim perspective is not strong enough alone to remain undamaged by the goals of the current system, that diversion may create a "net-widening" effect for less serious crimes, and that integrating an individualistic victim perspective leaves the punitive, adversarial "core" of the system unchallenged by restorative justice values. This seems clear from the present application of victims' rights laws. For these rights to be accomplished without losing to mainstream goals any restorative potential, restorative principles must be firmly attached as underlying values, something that has largely not been done thus far.

Many theorists believe restorative values can take hold inside the traditional criminal justice system. For instance, Edna Erez has hope in the possibility of a restorative role for the right to victim allocution during court proceedings through victim impact statements. According to Erez, for a restorative vision to win out, however, a conversion of criminal justice professionals to a restorative view of victim participation must occur. Erez does not think this is impossible in the adversarial system because "including victim input does not disturb the old order; rather, it can build and improve on it."

The Conflict Transformation Program (CTP) at Eastern Mennonite University, for one, is actively taking the mutual-benefit approach to try to change the attitudes of legal professionals. Their "defense-based victim outreach" strategy is an appeal to defense attorneys to "step back from the adversarial format" when it comes to dealing with victims, and instead work with victims to arrange a mutually acceptable plea bargain that meets needs of both victim and offender. CTP's position is

186. Walgrave, supra note 62, at 256; see also ROACH, supra note 108, at 305 ("Concerns have also been raised that [victim-offender mediation programs] will be used only in minor cases and contribute to net-widening. [They] can be more intrusive than criminal justice processing. For example, a nineteen-year-old who stole $40 worth of cosmetics agreed as part of a diversion project to attend fifteen job interviews, research the effect of a criminal record on women of her age, and spend seventy hours in community service.").

187. See supra Sections III and IV.

188. See, e.g., Erez, supra note 153, at 178-80.

189. Id. at 179.

190. Id. at 179.

191. Telephone Interview with Tammy Krause, Institute for Justice and Peacebuilding Associate, Conflict Transformation Program, Eastern Mennonite University (Sept. 23, 2002) [hereinafter Krause].

that a restorative system of values is beneficial to the defense team as well as the victim, for both moral and practical reasons. A less adversarial approach to dealing with victims has the potential to catch on with legal professionals, as is evidenced by the numerous defense teams that have shown interest in coaching from the program, including the defense team for Timothy McVeigh. CTP thus offers one possible model for trying to change the legal culture, working outside of the coercive power of victims' rights laws to try to introduce restorative justice to the criminal system. Such cultural change is necessary before a formal system of victims' rights may actually be restorative.

By choosing to work within the traditional adversary system, though, the possibility remains that a relational restorative model would be distorted and ultimately absorbed without really changing the traditional adversarial system. To survive as a separate theory of justice, restorative justice must not be equated with a simple court order of restitution to the victim, or respectful treatment of victim-witnesses in court. Rather, it must be a set of assumptions that underlie the legal process. Such a change requires a paradigm shift within the legal system.

The question, then, is one of the methodology of change to restorative values or process: whether incremental change within traditional adversarial processes can lead to a relational theory of justice, or whether diversion into a separate, parallel criminal justice program with a clearly articulated relational framework is necessary. What does seem clear is that criminal justice professionals must be convinced that a relational theory is, in fact, a better paradigm for dealing with crime. Only then may the justice system be ready for a paradigm shift. Until then, a few features of victims' rights that are compatible with restorative justice are likely to be embraced and absorbed with the "restorative justice" label, but without the underlying rationale that makes restorative justice something different from our current system. The danger of domestication of restorative justice by victims'

193. Krause, supra note 191 (stating that including the victim in a non-adversarial way in the decision-making or plea bargaining process allows the defense to be and be seen as more compassionate, allows the defendant to take accountability, lessens the trauma for the families of those involved, as well as shortens the judicial process).
195. For another attempt at a restorative redefinition of the lawyer's role, see Douglas Noll, Peacemaking: Practicing at the Intersection of Law and Human Conflict (2003).
rights is that restorative justice will go the way of other attempted reforms of the criminal justice system, with certain aspects being incorporated by the system, but without the underlying theory. Without a shift in theory about rights, practices that could be restorative may not actually be restorative.

**CONCLUSION**

Concern for the victim is shared by victims' rights advocates and restorative justice advocates. There are numerous problems, however, in finding a coherent vision for both victims' rights and restorative justice within traditional justice system processes or in alternative restorative processes. While this topic needs much more exposition, a few basic principles are necessary to begin formulating a restorative vision of victims' rights. A restorative conception of rights should allow for somewhat blurred lines between victim and offender in appropriate cases. It should be relational and non-adversarial, each right raising corresponding duties. In restorative processes, a difficulty in need of further development is balancing subjective senses of satisfaction with objective fairness.

For a restorative values framework of victims' rights to operate successfully within the current justice system, changing the legal culture seems essential to retaining the restorative effect. Although the danger exists that restorative justice will be domesticated into just another sentencing tool of our current justice system, a unified relational vision does have the potential to offer a true alternative to the traditional criminal justice system.

---

196. An example of such an attempted reform is the penitentiary. When operated on a small scale by a group of people who shared a common vision, the penitentiary was much different from what it became when the good idea was institutionalized by the state. See, e.g., VAN NESS & STRONG, supra note 4, at 114. The concept of restorative justice does not need to go the same way as the penitentiary, but caution is in order.